Hardwicke Building Espresso News

Hardwicke Building Injury Team

May 2005

Editorial

Hardwicke News

The Injury Team is praised in this year's legal journals. The 2005 edition of **Chambers &** Partners commends **Emily Formby** as a ***very effective and able junior***. The 2004 edition of the **Legal 500** (published in October) recommends the Hardwicke Building clinical negligence and injury team and names **George Pulman QC** as a ***leading silk*** and **Emily Formby** and **Maggie Bloom** as ***leading juniors***. **Legal Experts 2005** also lists **George Pulman QC**, **Maggie Bloom** and **Emily Formby** as ***leaders in their fields***.

We also congratulate George Pulman QC on his appointment as a Deputy High Court Judge and Karl King on his appointment as Recorder.

What's happening in the wider world?

The House of Lords decision in **Gregg v Scott** has at last been received. After an 8 months wait not only was the decision perhaps unexpected, but it has not provided the clarity on the law of causation that was expected – each judge has given a different reason for his or her conclusion reached. Matters may be even more confused with the judgment in **Chester v Asfar** – a case heard by the House of Lords after **Gregg v Scott** but in which judgment was delivered before the ruling in **Gregg**.

From the point of view of practitioners, a more lasting change to the injury world may well be the Courts' power to order periodical payments in all cases where orders and settlements are made after 1 April 2005. Time will tell whether the Government's expressed wish that "*the use of periodical payments in appropriate personal injury cases will become the norm*" is borne out. We give some tips on using the new regulations later in this Newsletter.

And finally …

We look forward to welcoming you to our Injury Team party, which will be held on **Thursday 30 June.** This year, we will have a Mexican theme. Ola!

The CVs of all the team members and details of the team in general can be viewed on the Injury Team section of the award winning Hardwicke Building website. Check out www.hardwicke.co.uk/pi/team.

If you would like copies of our Injury Team flier or details of our 2005 in-house seminar programme, or would like to add a name to our mailing list, please contact Lesley Richardson by email on lesley.richardson@hardwicke.co.uk or by telephone on 020 7691 0012.

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Case Law

Judge entitled to prefer oral evidence of one party over another

The claimant was paralysed from the neck downwards following a scrum in a rugby match. He sued the referee on the grounds that the referee had failed adequately to control the scrum in accordance with law 20 of the Laws of Rugby in that he: (i) failed to call "engage" before the two front rows engaged in the scrum and (ii) failed to notice that one of the props was not in the correct position as required by law 20. The judge at first instance heard oral evidence from the claimant and two players from the claimant's team on the claimant's behalf, and from the defendant and one player from the opposing team on the defendant's behalf. The judge preferred the evidence of the defendant and his witness to that of the claimant and his two witnesses and found for the defendant. The claimant appealed and sought a re-trial arguing that there were defects in the judgment because the judge had not been even-handed in his approach, had misunderstood some of the important evidence and had failed in a material respect to explain his conclusions.

The Court of Appeal dismissed the appeal and held that whilst it was indeed incumbent on the judge to give reasons for preferring one party's evidence, in the instant case the judge had unquestionably done so: as a matter of principle it was open to a judge to conclude that one witness had altered his evidence in a way which did not call into question his honesty or reliability whilst also concluding that another witness's change of testimony did show him to be generally unreliable. In the instant case the judge was entitled to draw inferences of unreliability against the claimant from the fact that a written report made soon after the accident did not contain any suggestion that the defendant had failed to control the scrum or enforce the correct positions. Finally, the judge was also entitled to take into account the inherent probabilities and the other evidence that supported his conclusion.

*(**James David Allport v Timothy Wilbraham** – CA – Auld LJ, May LJ, Neuberger LJ – 15th December 2004 – [2004] EWCA Civ 1668)*

Court must consider actual claimant when considering whether to impute s14A(10) Limitation Act 1980 knowledge

The claimant and her husband had instructed the defendant firm of solicitors to act for them in 1988 in respect of a mortgage required by the claimant's husband to discharge his business debts. In connection with the mortgage their home was transferred by deed of gift from the claimant's sole name into her and her husband's joint names. Six months later the claimant's husband had built up further debts and the claimant reluctantly provided a guarantee to the bank secured by a second charge on the home. Five years later the bank obtained a possession order suspended on agreed terms. In 2002 the claimant commenced the instant proceedings against the defendant alleging that the solicitor had negligently failed to advise her that the first mortgage could have been obtained without the need to transfer the property into joint names, thereby exposing the property to her husband's creditors. Although the judge found that the defendant had been negligent he concluded that the claimant was statute-barred under s14A of the Limitation Act 1980. On appeal the claimant argued that she had only acquired the relevant knowledge under s14A when she became aware that it was not necessary to transfer title of the

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property to joint names in January 2001. The claimant submitted that the judge at first instance had been wrong to hold that she should have taken legal advice prior to May 1999 when she had instructed solicitors. The defendant submitted that the claimant had actual knowledge for the purposes of s14A when she knew in 1988 that, as a result of the deed of gift, the share of the property she had transferred to her husband was liable as against his creditors.

The Court of Appeal held as follows:

(1) The claimant did not have actual knowledge for the purposes of s14A in 1988 when she knew that as a result of the deed of gift the share in the property she had given to her husband became liable to his creditors because she did not know at that time that that consequence was attributable to the defendant's negligent advice. (2) The claimant did have constructive knowledge for the purposes of s14A. She should have taken legal advice in November 1988, or in 1996 at the latest, when she knew as a result of transactions with the bank that the property was exposed to the risk of attachment for her husband's debts. She should reasonably have taken legal advice in respect of her claims against the bank as soon as she had been persuaded to execute the guarantee. The guarantee and second charge were so intimately bound up with the first mortgage and deed of gift that anyone advising on the guarantee and second charge would have realised that the deed of gift needed to be investigated. It did not matter to the application of s14A(10) that the claim against the defendant would only be discovered during the investigation into the claim against the bank. In determining whether it was reasonable to expect someone to take legal advice the test was objective and the court should consider the surrounding circumstances. On the basis that s14A(10) required the court to have regard to the position of the actual claimant, not a hypothetical claimant, it was appropriate for the court to take into account the claimant's belief that she had a claim against the bank. The court was entitled to assume that the claimant would have been concerned to know the reasons for her mistake as regards the consequences of her deed of gift. In any event the claimant was clearly put on notice in 1996 that she might have a claim against the defendant and she could reasonably be expected to have taken legal advice at that stage.

*(**Susan Mary Gravgaard v Aldridge & Brownlee (A Firm)** - CA - May LJ, Arden LJ, Black J – 9th December 2004 [2004] EWCA Civ 1529)*

Order dismissing an appeal against the striking out of a claim which simultaneously permitted claim to proceed was so confused that it could not be relied upon

The claimant's claim had been struck out by the district judge and the claimant had appealed to the circuit judge. The circuit judge dismissed the appeal but stated that the claim could continue and issued directions. On appeal from the circuit judge the defendant agued that the claimant's appeal against the strike-out had been dismissed in substance by the circuit judge and that all other parts of the circuit judge's order should be deleted. The claimant submitted that, on the contrary, the substance of the circuit judge's order was to allow the appeal against the strike-out and so it would be disproportionate to strike the claim out, hence the circuit judge's order should be varied accordingly.

The Court of Appeal held that the approach of the circuit judge had been so confused that it could not be relied upon. Consequently the matter required re-determination as if on appeal from

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the original decision of the district judge. Taking into account the potential prejudice caused by the delay in the conduct to the litigation, together with other relevant matters under CPR 3.4 and CPR 3.9, it was disproportionate to strike the claim out. In those circumstances the original decision of the district judge to strike the claim out was set aside.

*(**Welsh v Parianzadeh** - CA (Civ Div) – Peter Gibson LJ, Mance LJ – 10th December 2004)*

Judge had unfettered discretion on Part 36 offers

The defendant appealed against a decision refusing him permission to accept a Part 36 offer more than 21 days after the date it was made by the claimant bank. As mortgagee the bank had sought possession of the defendant's yacht and made a Part 36 offer in the proper form. The defendant had denied that the yacht was the subject of the mortgage and did not respond to the claimant's communications. Following inspection of the yacht the claimant discovered evidence indicating that the defendant's defence was unsustainable. The claimant still offered to settle but there was no response. On the day of trial the defendant applied for permission to accept the Part 36 offer out of time, submitting that this could only be refused if there had been a change of circumstance since the date when the Part 36 offer was made, and a change of the kind that would entitle a defendant who had made a Part 36 payment into court to withdraw or reduce the monies in court.

Accordingly, the defendant argued that the claimant could only object to the defendant being permitted to accept the Part 36 offer out of time if it intended to withdraw or reduce the offer on the basis of such a change.

The claimant submitted that the judge had an unfettered discretion whether to allow late acceptance and had made no error of law in refusing. The claimant contended that the result of the yacht inspection was a change of circumstance but that even without it the judge could rely on other factors.

The Court of Appeal dismissed the defendant's appeal. The judge was not fettered in his discretion. Relevant considerations might be the availability of the defendant's money, the timing of the application or a change of circumstance (***Cumper v Pothecary** [1941] 2 KB 58 applied*). There was no justification for stipulating that a claimant had to withdraw or reduce the Part 36 offer in order to oppose the defendant's application to accept the Part 36 offer out of time. In the instant case the evidence revealed by the inspection of the yacht, which the defendant had sought to delay as long as possible, had shown that there was no sustainable defence and this had justified the judge's refusal to allow the defendant to accept the Part 36 offer out of time. The judge had also been entitled to take into account the defendant's delay in making the application and his pre-trial conduct.

*(**Capital Bank Plc v Peter Stickland** - CA - Mance LJ, Keene LJ, Longmore LJ – 10th December 2004 [2004] EWCA Civ 1677)*

Reasonableness of the success fee assessed by reference to what the solicitors knew for conditional fee agreement entered into prior to the arrangement in CPR Part 45 (III)

Two conjoined appeals were brought on the question of the appropriate level of the success fee in road traffic related personal injury claims under conditional fee agreements (CFA's). Both of the CFA's in question had been entered into prior to 6th October 2003 and therefore both fell under the regime which was in

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place before CPR Part 45 (III) was initiated. In the first case the claimant was injured when the defendant negligently drove his lorry around a roundabout. The claimant obtained judgment in his favour and considered reasonableness of the success fee on the basis of the risk of the claimant losing his case at the time when the CFA was entered into. The judge considered the level of risk was not substantially higher than any other case involving roundabouts and reduced the success fee to 50%. The claimant appealed unsuccessfully against this decision. In the second case the claimant was injured when the defendant reversed into her as she was walking through a car park. Proceedings were brought but the case was settled after the Defence was filed. The judge found that the claimant was entitled to the 30% success fee claimed. The defendant appealed this decision.

The Court of Appeal held (1) The reasonableness of the success fee was to be assessed by reference to what was, or ought to have been, known at the time the CFA was entered into. In the first case before the court the claimant's solicitor had evidence such as the claimant's version of events and an assessment of the accident. The solicitor's matrix which should have revealed his thought processes when assessing the risk was found to be of no value. Accordingly the judge had been right to consider the matter from the perspective of the reasonably careful solicitor on the basis of what that solicitor knew at the time. On the evidence available to the claimant's solicitor at the time of the CFA the judge's figure of 50 per cent was well within the range of reasonable success fees. The claimant's appeal in the first case was dismissed. (2) In respect of the second case before the court, the guidance given in ***Callery v Grey (2002)*** *UKHL 28, (2002) PIQR P608* could be applied by analogy notwithstanding the fact that the instant case had been allocated to the multi-track and had settled for more than £15,000. There were no factors in the case in question to legitimately raise the success fee above 20 per cent. The uncertainty of the identity of the driver could have been resolved by a single telephone call to the police before the CFA was entered into. The only significant risk was the possibility that the claimant would accept her solicitor's advice not to accept a payment into court and would then fail to beat the payment in. In those circumstances the defendant's appeal was allowed and a success fee of 20 per cent was substituted.

*(**Lee Anthony Atack v (1) Michael Edward Lee (2) Alan Grechan & Hilda Mae Ellerton v John Horace Tait Harris** - CA - Brooke LJ (V-P), Mance LJ, Longmore LJ – 16th December 2004 [2004] EWCA Civ 1712)*

Degree of control of nightclub owner sufficient to make door stewards employees

The claimant sued for damages arising from an assault on him by a door steward, an employee of the second defendant, outside a nightclub owned by the first defendant. The trial was of liability only. The second defendant supplied security services, including door stewards, to the first defendant. The second defendant had a contract for "combined liability insurance for the security industry" with the third defendant covering both employers' and public liability. In the course of his employment the door steward had assaulted the claimant. The claimant alleged that both defendants were liable in negligence for the acts of the door steward and he sought to enforce the public liability indemnity in respect of "accidental bodily injury". The second defendant failed to file a defence and judgment was entered against it in

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default. The claimant submitted that the door steward was a temporary employee of the first defendant. The first defendant submitted that if the level of control was such that the door stewards were their temporary employees and this was the normal arrangement between club operators and security service providers, then the requirement in the case law for "exceptional circumstances" would require something more than that level of control shown in order for vicarious liability for the door steward's actions to pass from the second defendant to the first defendant. The third defendant contended that the bodily injury was not accidental from the perspective of the perpetrator.

The Court of Appeal held that (1) The paramount test for whether the first defendant could be vicariously liable was that of the nature and extent of control they exercised over the door stewards. ***Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool)*** *[1947] A.C.1* applied. It was not relevant that the contract between the first and second defendant specifically provided that all the door stewards would be employees of the second defendant regardless of the circumstances. It was plain from the evidence that the first defendant sought to and did exercise detailed control over what the door stewards did and how they did it. This level of control made the second defendant's employees temporary employees of the first defendant for the purpose of vicarious liability and therefore the first defendant was vicariously liable for the injuries caused to the claimant by the door steward. (2) Central to the dispute about the third defendant's liability to indemnify the second defendant was the issue of from whose perspective the bodily injury had been "accidental". If viewed from the perspective of the second defendant the word "accidental" could still apply. Since the natural way to construe an insurance contract was from the perspective of the insured, not a third party, it would take an exceptional set of circumstances to construe a core provision of the contract from the perspective of a third party, rather than the insured. The third defendant correctly conceded that if viewed from the second defendant's perspective the claimant's bodily injuries were "accidental". Hence, the second defendant's liabilities under the default judgment fell within the cover provided by the policy and the claimant was entitled to the benefit of the third defendant's indemnity.

(***David Philip Hawley v (1) Luminar Leisure Plc (2) Ase Security Services Ltd (3) David Preston Mann (Nominated Underwriter for Faraday Underwriting Ltd)*** *– QBD – Wilkie J – 10th January 2005 [2005] EWHC 5 (QB)*)

Costs of new technology allowed

The claimant was awarded damages for injuries caused by an accident at work. The claimant suffered traumatic brain injury, such that he required a 24 hour care package for life. He was 30 at the time of injury. Amongst arguments on quantum was one relating to video telephones. The cost of such phones were allowed as being a reasonable expense for the claimant. However, the multiplicand would be fixed on present price for future loss – it would be wrong to speculate on future likely cost and changes to charging rates for this new technology.

(***Bhawesh Patel v (1) Michael John Wright (2) Midas Security Group Ltd*** *– QBD – Treacy J - [2005] EWHC 347 (QB))*

Dependency on deceased not proved

The claimant cohabited with the deceased before he was killed and she was injured in a road traffic accident in March 2000. The claimant claimed

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dependency on the deceased but this was challenged by the defendant who said they had not been living together in the same household as man and wife for two years prior to the accident (*Fatal Accident Act 1976 s1(3)(b)*). Right to dependency was decided as a preliminary issue. The Judge found that the claimant only moved into the same household as the deceased within the meaning of the Act when she became pregnant in 1998, after March. The Judge examined the facts and concluded that an intention or desire to live together was not the same as actually doing so. Having regard to evidence that (a) the deceased kept his own home; (b) kept his clothes at his own home and took an overnight bag to the claimant's house; (c) did not live with the claimant full time until he had sold his house and they bought one jointly; (d) the claimant's evidence that it was only after pregnancy that they planned a life together entitled the Judge to conclude the requirement was not satisfied. Evidence that the pair shared shopping expenses and spent time together in the claimant's house was not sufficient to displace this finding nor to render it unreasonable.

The Court of Appeal upheld the decision at first instance and the claim for dependency was dismissed.

(***Kotke v Saffarini*** *– CA – Potter LJ, Buxton LJ – [2005] EWCA Civ 221*)

Contributory negligence when vehicles met in middle of road

The defendant was found to be 50% to blame for a road traffic accident on a country road. The parties were travelling in different directions, the defendant on a motorbike, the claimant in a car. They came upon each other at a blind bend where the view was obscured. The defendant lost control of his motorbike and came off at speed. He had been riding at excessive speed at the time of the collision, but the claimant's car had been straddling the notional centre line. The judge held the parties would have collided even if the car had been wholly on its side of the road and so held they were each 50% to blame.

On appeal the defendant argued that if the car had been on the correct side of the road, while he would have come off his motorbike he would not have hit the car and been injured. Further, even if he had been travelling more slowly (at 40 mph) the accident would still have happened and even though his conduct may have been causative of the accident, his responsibility should have been assessed at no more than 25%.

The Court of Appeal rejected these arguments. While not every judge would have reached a 50/50 split it was within the reasonable range of apportionment.

(***Askey v Wood*** *– CA – Chadwick LJ, Longmore LJ – LTL 21/4/2005 – unreported)*

Contributory negligence when turning right across traffic

The first defendant was found to be 50% to blame for injuries suffered by the claimant in a road traffic accident. The first defendant was trying to turn right from the main road to a side street. He had to cross two lanes to do so. The oncoming traffic was at a standstill. Access was available because there was a "Keep Clear" marking on the road. The first defendant turned against the traffic and struck the claimant who was riding a motorcycle on the inside of the stationary traffic.

The judge held the claimant and the first defendant equally to blame. The claimant should have appreciated how dangerous his manoeuvre of driving past stationary traffic was, and had he done so he would have been alert to the very risk posed by the first defendant. However, the first defendant was also to blame. A Keep Clear sign did not allow him to turn with impunity – he should

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have been aware that there was still room for a two wheeled vehicle to pass.
The first defendant appealed saying the judge had set too high a standard of care, it was the claimant who had been attempting the dangerous manoeuvre.
On appeal the Court of Appeal held that in attempting to turn against the opposing traffic, even when stationary, the driver had to proceed with the utmost caution and not cross until he had satisfied himself no traffic was likely to come up the inside of the carriageway he was crossing. He should have taken extra care to ensure there was no two wheeled vehicle where there was room for one. The judge's finding of liability and apportionment was upheld.
(***Fagan v (1) Jeffers & (2) Motor Insurers' Bureau*** *– CA – Thorpe LJ, Scott Baker LJ, Wilson J – 9/3/2005 – LTL/AC9300546 unreported)*

Causation of Vibration White Finger
The claimant worked for the defendant using vibrating tools. Having started work in 1982, by 1999 he was diagnosed as suffering from vibration white finger. At trial he said that the defendant should have been aware of the risk of the risk of VWF since 1975 when a British Standards Institute publication was issued. Further, by 1987 a second publication from the Institute should also have been known by the defendant.
There was no dispute that the claimant had suffered vibration white finger from his work with the defendant but on appeal it was argued that their liability did not arise until the mid-1990s and so damages should be reduced.
On appeal it was held that the 1975 publication did not represent a British Standard and it was not reasonable to conclude that the defendant should have been aware of it, ***Stokes v GKN (Bolts & Nuts) Ltd*** *[1968] 1 WLR 1776* and ***Thompson v British Shiprepairers*** *[1984] QB 405* applied). However, the 1987 publication was of far greater significance and the defendant should have known of it. The defendant should have investigated the extent of their fitters' exposure to vibration and have instituted remedial measures within two years of the publication, therefore by 1989. Therefore, the defendant was negligent to the claimant in respect of his work from 1989, and the recorder's judgment was varied to that extent.
As to damages, however, it was open to the claimant to argue that all damages should be paid by the defendant. General damages were not to compensate a claimant for the amount of damage suffered but the effect of that damage on him. While there may have been exposure to other vibration before the date of knowledge, he should receive full verdict damages because he could argue that but for the negligence of the defendant he would not have gone on to develop any symptoms, and this argument was sustainable despite the fact that symptoms did not develop until 1999, some 17 years after exposure had begun and 10 years after the defendant's negligence commenced. There was no evidence to justify reducing the damages to take account of latent damage prior to 1989.
(***Brookes v (1) South Yorkshire Passenger Transport Executive (2) Mainline Group Ltd*** *– CA – Brooke LJ (V-P), Smith LJ, Wall LJ – [2005] EWCA Civ 452*)

No order for costs despite success in case due to material change in account
The claimant was injured falling at the bottom of a stairwell. Her pleaded case was that the accident happened "almost in complete darkness". The defendant said there was sufficient referred light from corridors for her to see light switches which she should have used. At trial, the claimant said there was some light at the top of the stairs, but it

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got progressively darker as she went down. The Judge held that the bottom of the stairwell was in darkness and the defendant was liable.

However, he made no order as to costs on the basis that the claimant had materially changed her case.

On appeal, it was held there was no material change to the case, the only basis for such a decision would be if the defendant had been misled so as to affect its approach to the defence of the claim and its decision whether to settle or dispose of the action. The main issue was always whether the claimant's fall was due to the defendant's breach of duty because the bottom of the stairwell was dark. This remained the case throughout and the judge found in the claimant's favour on the point.

Not only should the usual order for costs be made but since the claimant had made a Part 36 offer and her damages exceeded those, she received indemnity costs from the appropriate date.

(***Jasmin Alli v Luton & Dunstable NHS Trust*** *– CA – Auld LJ, Latham LJ, Jacob LJ – LTL 27/4/05 – unreported*)

Purpose of PUWER regulations was general consideration of safety against broad risk of injury by machinery

The claimant lost the sight of his eye when using a hay mowing and bailing machine owned by the defendant. Prior to use, the claimant adjusted the machine and part of a coil spring fractured, and ricocheted into his left eye. The claimant alleged breach of regulation 5 of the Provision and Use of Work Equipment Regulations 1998 – a failure to keep the machine in good repair and efficient working order. The claim failed because the judge held that while the regulations did apply to the machine there was no failure to maintain and the defendant could not be liable for the accident because it was not reasonably foreseeable.

On appeal the Court agreed that the regulations applied to the machine and the use of the machine – its use was part of an overall commercial arrangement and pursuant to regulation 3(3)(b) the defendant was someone with "control to any extent" of the equipment. Regulation 3(5) did not in these circumstances provide exemption. It was clear that the failure of the machine caused the accident. The regulations imposed an absolute duty under regulation 5 and the purpose of this was to render the task of the injured workman easier by requiring him simply to prove the mechanism of the machine failed to work efficiently or was not in good repair and this failure caused the accident. The judge was wrong to hold that regulation 5 related to identified risks or that because the accident was not foreseeable there was no breach (***Fytche v Wincanton Logistics Plc*** *(2003) EWCA Civ 874* distinguished). The focus of the regulations was not upon identification and assessment of specific risks but upon general considerations of safety against the broad risk of accidental injury inherent in the use of any machinery which was not maintained in good repair and efficient working order. The claimant succeeded subject to a 25% reduction on the basis of a co-existing breach of statutory duty.

(***Ball v Street*** *– CA – Potter LJ, Longmore LJ, Jacob LJ – [2005] EWCA Civ 76*)

Recoverability of uplift for CFA assessed at different rates

The paying party argued that a 100% uplift throughout the course of proceedings was unreasonable. The mother acting as litigation friend of the child claimant had been awarded a 100% uplift by the District Judge at the end of the claim from commencement of the agreement until the Local Authority defendant filed a defence. Thereafter, the Judge held the uplift

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should have been reduced to 5% for substantive proceedings and in the detailed assessment hearing for costs.

On appeal the judge held that the district judge had no right to reduce the uplift.

In the Court of Appeal it was held (i) the assessment of reasonableness of the success fee had to be made with regard to risk as it appeared to the solicitor at the time the CFA was entered into. At that stage, the Court would have allowed a 50% uplift, not 100% - to reflect a 2:1 prospect of success; (ii) the CFA did not allow contractually for the possibility of a different success fee rate at a different time of the proceedings, therefore the Court had no power to direct that there was a different rate recoverable at a different period (***Halloran v Delaney*** *(2002) EWCA Civ 1258* applied). Insofar as the Costs Practice Directions para 11.8(2) suggested otherwise, it was wrong. The only assessment available to the Court in this instant case was to consider whether the uplift was reasonable at the time it was made. The Court of Appeal would have allowed only 50% but since this point was not appealed, the original 100% having been assessed as reasonable when made would stand throughout the proceedings.

(***Ku (a child by her Mother and Litigation Friend Pu) v Liverpool City Council*** *– CA – Brooke LJ, Rix LJ, Dyson LJ – [2005] EWCA Civ 475*)

Expert could be ordered to pay costs in appropriate circumstances

A preliminary point was brought by administrators as to whether a respondent expert could be joined to the proceedings for the purposes of costs, CPR 48.2. Z, a psychiatrist, had written a report for the court alleging that the defendant lacked mental capacity and was not fit to provide evidence. The court ruled otherwise. The issues for determination were whether the expert could be joined as a respondent for costs purposes; whether proceedings were flawed because he expert had not been warned of this possibility; and whether the principle of the general immunity of a witness from suit in respect of evidence given conflicted with the potential liability for a claim for costs.

It was held that the expert had an objective duty to comply with the expert's duties set out in the declaration provided at the end of his report. This made it clear the expert could be the subject matter of contempt proceedings. No further warning was required since the expert would be alive to potentially adverse consequence if he breached his duty to the court (***Orchard v South Eastern Electricity Board*** *[1987] QB 567* applied). This included in appropriate cases a third party costs order being brought against somebody who was a witness as a result of the manner in which he gave evidence as a witness (***Symphony Group Plc v Hodgson*** *[1994] QB 179* applied). That an expert may face a costs order would not operate as a deterrent. Advocates could face costs orders and did not have immunity from suit yet this had not affected their practice. It would be wrong of the court to remove its power to order costs as a sanction in appropriate cases against an expert who by his evidence caused significant expense to be incurred and did so in flagrant and reckless disregard of his duties to the court.

(***Phillips v Symes (A Bankrupt)*** *- ChD – Peter Smith J – [2004] EWHC 2330)*

Appropriate damages for pleural plaques

Ten claimants claimed damages for negligent exposure to asbestos on the basis of X-rays confirming appearance of pleural plaques. Three claimants sought final awards, seven provisional damages. Negligence was admitted, the defendant

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denied exposure to asbestos occasioned any injury such as could complete the necessary foundation for a claim in damages since (a) the appearance of the plaques did not mean the claimant suffered sufficient injury to form a claim and (b) in so far as there was injury, the damages awarded were too high.

The court held that pleural plaques were a pointer that a claimant had been exposed to asbestos and it had effected the lungs. There was a permanent physical penetration of the chest by fibres, but this was not enough of itself to constitute injury or damage. Pleural plaques alone could not found a cause of action, it had to be shown to be real other than minimal and capable of being discovered (***Cartledge v Jopling*** *[1963] AC 758* applied). However, physiological damage caused by permanent penetration of the chest by asbestos fibres with attendant risk of future onset of symptomatic diseases and the anxiety this caused could give rise to a cause of action.

The provisional award was compensation for penetration of the body by asbestos figures of sufficient extent and maturity to give rise to pleural plaques and to the risk of the onset of a symptomatic condition with concomitant suffering or loss of amenity due to anxiety. A just award would be no more than £4,000. The final award adopted the approach of considering whether the risk of developing the disease was substantial or real or speculative. Based on the low level of risk, the appropriate award was £6,000 - £7,000. Awards that did not recognise the strong probabilities that the risk would not materialise were too high.

(***John Grieves & 9 ors v FT Everard & Sons & British Uralite Plc & 9 ors*** *– QBD – Holland J – [2005] EWHC 88 (QB))*

Helpful website

The Highway Code is one of those things you often need to look at but can never lay your hands on. Old copies of the Highway Code as less than helpful and new versions never seem to last on bookshelves!

Now you can find the up to date code in full on www.highwaycode.gov.uk

Summer in the USA

Katrina McAteer tells tales of personal injury work in San Francisco

I visited America in summer 2004 having been awarded a Pegasus Scholarship. This Scholarship gives young barristers the opportunity to travel abroad to shadow lawyers in other common law jurisdictions and the European Union.

My first two weeks were spent shadowing a Judge in the Superior court of San Francisco observing a wide range of personal injury hearings, including jury selection, conferences, 'in limone' motions (pre-trial applications) and a very contentious 'toxic mould' trial. My overall impression is of a court system, which engenders and positively encourages settlement. Prior to trial the attorneys are obliged to attend settlement conferences in which the Judge takes an extremely active role. He or she will have a private meeting in chambers with the attorneys and their clients. The aim is to explore the weaknesses, strengths and concerns of the teams and to elicit a dollar figure that may conclude the litigation.

Some say that toxic mould is the new asbestos so perhaps I have been afforded a glimpse into the future of English personal injury litigation. There are two types of toxic mould cases: personal injury cases, where a Claimant alleges that he/she has been injured by

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exposure to toxic mould (in residential and commercial environments) and property damage cases, where a property owner seeks the cost of repairs to his building to remove mould.

While research has linked asbestosis to exposure to asbestos there is no clear cut link between mould and injury.

Causation is the key issue in this litigation. Some types of mould, particularly those that produce myotoxins (by-products or metabolites) can lead to health problems. Symptoms present as allergies, coughs and asthma type problems.

I also had the opportunity to be involved in that great American legal tradition: taking the deposition. This is the sworn testimony of a witness taken before trial, and it is held out of court with no judge present. The witness is under oath and each party may ask questions. Proceedings are recorded. It forms part of the pre-trial discovery (fact-finding) process. The aim is not to cross-examine (which I found difficult not to do) but to lay the foundation for later impeachment.

My last few weeks were in a large Defendant firm - over four hundred attorneys in six locations. I was involved in settlement negotiations in a ten million dollar employers liability claim. Interestingly, a workers' compensation scheme exists, a no-fault system, so injured employees need not prove that the injury was someone else's fault in order to receive compensation benefits for an on-the-job injury. Litigation therefore focuses on whether the injury was sustained on the job or on how much in benefits an injured worker is entitled to receive.

My experiences have allowed me to analyse some of the fundamental precepts of our English personal injury practice through the lens of another jurisdiction – a fascinating opportunity.

Katrina McAteer

Closer Look

Who cares?

Charlie Bagot asks who should foot the bill for injured claimants' care and accommodation in the light of Sowden v Lodge?

The debate as to whether local authorities or tortfeasors' insurers should pay for the care and accommodation needs of injured Claimants rages on. The recent case of ***Sowden v. Lodge*** *[2004] EWCA Civ 1370* highlights three competing legal principles in this area and the increasing tension in reconciling them:

1. The principle of 'full compensation', i.e. that: '*a tortfeasor must meet the claimant's reasonable expenses in coping with the injury that he has caused*...' Put differently, the Court must award damages so as to put the Claimant back into the position he would have been in, but for the Defendant's tort.
2. The principle that a Claimant can normally only recover for actual losses and a Claimant has no claim where the loss will be made good from a source other than the tortfeasor.
3. The extent to which the state should be able to recoup the cost of providing care from those in receipt of compensation or compensators themselves.

There are ever increasing legislative obligations on local authorities to provide care for those who cannot care for themselves. It is clear that those in need have become more aware of their rights and more prepared to enforce them against public bodies. However,

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Defendants and their insurance companies facing compensation claims are also alive to local authorities' obligations and are seeking to offset the often very substantial cost of ongoing private care and accommodation claims.

The decision in ***Sowden*** highlights the contradiction of principle between claims for medical expenses and claims for the cost of care. It is not open to a Defendant to argue that it was unreasonable for the Claimant to incur the private cost of medical treatment, as opposed to relying on the *NHS (Section 2(4) of the Law Reform (Personal Injuries) Act 1948)*. However, ***Sowden*** confirms that it is open to a Defendant to challenge whether it is reasonable to incur the private cost of care and accommodation in view of local authorities' obligations to provide for these needs.

Whilst there are of course some circumstances in which public bodies can claim back sums expended on injured Claimants (state benefits and capped NHS charges via the Compensation Recovery Unit), they are not yet able to claim back the cost of care provided from tortfeasors' insurers. The Law Commission has pressed for the law to be changed to permit the recovery of full state provision from insurers (at least for medical expenses), but it has not happened yet. There was judicial support for this change in ***Sowden***, although the Lords Justices made it clear that this is a matter for Parliament and not the appeal courts. For a long time local authorities had the power to require a Claimant to repay the value of care provided from his or her own resources or compensation award.

The position changed with the *National Assistance (Assessment of Resources) (Amendment) Regulations 1998*. Claimants are now able to ring fence damages awards which are administered via the Court of Protection (Patients or Children) or within a 'Personal Injury Trust' (any Claimant who chooses to set up a Trust) and avoid recoupment. However, Defendants have used this legislation to argue, successfully, that a Claimant cannot recover as damages, the cost of care provided by a local authority as the Claimant has not and will not in fact incur any loss. Whilst this argument was held to be sound in ***Sowden***, the Judges did question whether this was the intention of those enacting the *1998 Regulations*. Longmore LJ lamented: '*I did occasionally wonder during the hearing whether it was really the intention of the draftsman of the 1998 regulations not merely to ring-fence an award of damages, once made, so as to ensure that such award should be unavailable to local authorities providing or paying for care services to a claimant but also to achieve the result that, because no claim to recoup themselves from such an award could be made by local authorities, a defendant tortfeasor was to be under no liability to compensate a claimant for the cost of such services.*' It was for this reason that the Court of Appeal impliedly put its weight behind the Law Commission's original proposals for a change in the law, whilst noting that this was not a matter for the courts.

Sowden is, on the face of it, good news for Defendants. If local authority provision is held to be adequate and is found by the Court to equate to a Claimant's reasonable needs, a Defendant's argument that the Claimant has sustained no loss will defeat a claim for private care costs. Equally, even if a Claimant's needs are held to exceed local authority provision, a Defendant will only be required to pay the 'top-up' cost of augmenting the basic care provided out of public funds.

The Court reiterated in ***Sowden*** that the test for assessing damages is what the

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Claimant establishes that he 'reasonably needs'. It is not what is objectively 'in a Claimant's best interests' which is a different (often higher) test. One often sees experts, particularly care experts, referring to a Claimant's 'best interests' or even those of his or her family. It is suggested that it would be wise to set out the appropriate test in letters of instruction to even experienced experts.

Defendants cannot simply sit back and argue 'no loss' or a failure to mitigate if a Claimant does not investigate and enforce the local authority's obligations to provide care. Whilst Claimants must prove what their reasonable needs are, there is no legal burden on them first to disprove that statutory provision will be adequate. It is for a Defendant who says that local authority provision is sufficient (or only 'top-up' care is required) to set this out in clear terms prior to Trial and to argue the point. The parties will need to advance cogent evidence of how the respective regimes for care and accommodation proposed by them will operate. In most cases, positive evidence will be necessary to demonstrate what the local authority would provide (or could be required to provide) pursuant to *section 21* of the *National Assistance Act 1948* as amended. Presumably this could be achieved either by requiring the local authority to carry out an assessment or by engaging a care expert to state what a reasonable *section 21* assessment would provide. Both are likely to be necessary and disputes will of course arise. Local policies and resources will need consideration. It is to be expected that local authorities will be swamped with requests for assessments in high-value cases, in the light of ***Sowden***. Reliance upon expert opinion to give a guide to the likely assessment will be a good port of call as a starting point for both parties.

There is an additional point which the Courts must consider and that is whether local authority care alone, or in conjunction with 'top-up' care paid for by a tortfeasor, is practical and feasible. In ***Crookdale v. Drury,*** the conjoined appeal heard with ***Sowden***, the Court of Appeal upheld the Trial Judge's finding that reliance upon local authority care was not appropriate, nor was 'top-up' care workable. The Judge noted that the Claimant in that case was *'particularly demanding'* and that he had to be handled *'with great sensitivity'*. This was one factor in the decision as to whether his reasonable needs required private care. The Claimant in that case stressed the practical difficulties of attempting to manage and co-ordinate a care regime in which two different sets of carers, employed by separate employers, are expected to operate together. However, Claimant advisers should not assume that in the case of a 'particularly demanding' Claimant, private care will routinely be recovered. The Claimant in ***Crookdale*** was assisted by the failure of the Defendant to advance evidence of what the local authority would have provided and, had this been done, it might have undermined the Claimant's case. Equally, those advising Defendants would be wise in future to marshal evidence of statutory provision well before trial and set out a positive case, at the latest in the final counter schedule.

The present uncertainty will not benefit either side. It is not in the interests of either party to be forced into an expensive and difficult evidential tussle about how to value local authority care and the 'top-up' in a particular case. Litigation will be delayed by a back-log of local authority assessments. Claimants will be exposed to greater risk and will find it more difficult to value cases accurately and within a reasonable timescale. It is not in insurers' interests to have to pay for the costs of adding

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significant complexity to the task of valuing care and accommodation claims. Neither is it in their interests for fewer cases to be compromised by reason of these difficulties. Legal costs per case will increase. Longmore LJ in ***Sowden*** referred to the views expressed by Harvey McGregor QC in his *Law of Damages*: '*this is an area of law where it is doubtful whether there is any real utility in unravelling the intricacies which need to be resolved.'*

The law is not just in a state of flux, it is in a mess. ***Sowden*** will not be the last word in the ongoing debate about the relative merits of the competing and frankly contradictory legal principles in this area. The issue is whether society wishes to pay for injured Claimants' care through taxation or via increased insurance premiums.

The Courts have made it clear that they are struggling do justice between Claimants and compensators whilst these conflicting principles remain and that Parliament should intervene: '*It seems to me that only by legislation can any rationality be brought to this problem. Meanwhile the courts have to do their best to keep the anomalies to a minimum' (*Scott Baker LJ in ***Sowden***).

Longmore LJ indicated that he thought it unlikely that Parliament intended for the financial burden of paying for care to shift from tortfeasors' insurers to local authorities. He went on: '*It might be thought that it would be more appropriate for legislation to provide that both NHS Trusts and local authorities could recover the costs of medical expenses and care respectively from the tortfeasor as the Law Commission recommended (at any rate in relation to medical expenses) in 1999.'*

There is likely to be an outcry by local authorities who may be overwhelmed by requests for 'Section 21' assessments and faced with the prospect of paying for care and accommodation in many more cases. This, more than any amount of judicial comment, is likely to prompt further legislation to clarify this area. Expect insurance premiums to rise!

Charles Bagot

Periodical Payments – the future?

Find some answers to questions on the new procedures

When do the changes come into effect?

On 1st April 2005 the long awaited changes to the Courts' ability to impose periodical payments instead of solely lump sum awards arrived. How popular they will be with parties and the Courts is a completely open question and only time will tell.

What are the changes?

Law- Section 2 of the Damages Act 1996

(1) A court awarding damages for future pecuniary loss in respect of personal injury-

(a) ***may*** *order that the damages are wholly or partly to take the form of periodical payments, and*

(b) ***shall*** *consider whether to make that order.*

(2) A court awarding other damages in respect of personal injury may, if the parties consent, order that the damages are wholly or partly to take the form of periodical payments.

(3) A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure.

Pleading - Part 41.5 of CPR

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(1) In a claim for damages for personal injury, each party in its statement of case may state whether it considers periodical payments or a lump sum is the more appropriate form for all or part of an award of damages and where such statement is given must provide relevant particulars of the circumstances which are relied on.
(2) Where a statement under paragraph (1) is not given, the court may order a party to make such a statement.
(3) Where the court considers that a statement of case contains insufficient particulars under paragraph (1), the court may order a party to provide such further particulars as it considers appropriate.

Practice – CPR 41.6
The court shall consider and indicate to the parties as soon as practicable whether periodical payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages.

Factors to be taken into account – CPR 41.7
When considering –
(a) its indication as to whether periodical payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages under rule 41.6; or
(b) whether to make an order under section 2(1)(a) of the 1996 Act,
the court shall have regard to all the circumstances of the case and in particular the form of award which best meets the claimant's needs, having regard to the factors set out in the practice direction.

Practice Direction 41B
1.The factors which the court shall have regard to under rule 41.7 include –
(1) the scale of the annual payments taking into account any deduction for contributory negligence;
(2) the form of award preferred by the claimant including –
a. the reasons for the claimant's preference; and
b. the nature of any financial advice received by the claimant when considering the form of award; and
(3) the form of award preferred by the defendant including the reasons for the defendant's preference.

What are the effects of the changes?
In all cases where there is a claim for future loss (usually but not only loss of earnings and or care) it is initially up to the parties as to whether to ask for PPs but the Court has a duty to consider it, presumably as an early Case Management decision. There appears to be one gap in all of this – the lack of guidance for the judiciary. It follows that, until such guidance is published, there is likely to be significant variation in judicial approach.
The old PD 40C on Structured Settlements (now withdrawn) suggested that consideration should be given to structured settlements in all cases where the whole value of a claim was over £500,000. As yet there is no such financial guidance. There are going to be some Claimants for whom a steady RPI linked income stream will be very useful even if that income is modest. It follows that cases with a value much less than £500,000 could be suitable. It is therefore hard to anticipate how the 'scale of the annual payments taking into account any deduction for contributory negligence' will be used to influence decisions.

What about the competing interests of the parties? How does a judge perform the balancing act?
In the past Structured Settlements, (periodical payments by agreement

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backed by annuities), were little used because of the very obvious difference in preference of the parties! It is easy to speculate that the primary complaint and opposition of insurers will be the difference in cost.

The few structures that were implemented were mainly top down giving Claimants lower incomes than the original award was based on. The parties would agree the value of the claim based on a lump sum basis then calculate what that lump sum, or a proportion of it, would buy by way of an annuity. With low return rates, increasing life expectancy and the annuity providers need to make profit it was normally impossible to achieve the 'right' income unless lump sums for PSLA or past losses were also used.

Where we suspect it will have greatest uptake will be NHS Trusts. The main reason for this is that they will not need to buy annuities or other products, they will be able to self fund.

Does payment have to be secure?

Section 2(3) imposes the need for the court to be satisfied that the method of payment is secure. Subsection (4) expands upon this -

(4) For the purpose of subsection (3) the continuity of payment under an order is reasonably secure if-

(a) it is protected by a guarantee given under section 6 of or the Schedule to this Act,

(b) it is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by section 4 of this Act), or

(c) the source of payment is a government or health service body.

The first is a guarantee for public sector settlement backed by Crown guarantee.

The second is that it comes under strict terms and conditions similar to those that existed for structured settlements and

The third speaks for itself.

It is the public sector and the NHS that will prefer to self fund. There is the obvious advantage that no annuity or other product needs to be bought from someone making a profit therefore the cost of the 'middleman' is avoided. Budgetary issues also make it preferable for substantial immediate outlay to be avoided in order that the money can be retained for dealing with current business – such as trying to get patients better!

What is the variation clause?

Section 2B of the Damages Act provides for variation of periodical payments orders. This is only in respect of claims commenced after 1st April 2005.

There is a separate guidance in the **Damages (Variation of Periodical Payments) Order 2004**. The power is confined to limited situations similar to those for Provisional Damages save for one important difference:

Article 2. If there is proved or admitted to be a chance that at some definite or indefinite time in the future the claimant will -

(a) as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or

(b) enjoy some significant improvement,

in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission, the court may, on the application of a party, with the agreement of all the parties, or of its own initiative, provide in an order for periodical payments that it may be varied.

Such an award can be made alongside an order for provisional damages and must specify what changes would permit such an application.

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It is noteworthy that a Defendant can apply as well as a Claimant How is this going to work? Will video surveillance teams be out 5 years after 'settlement'?

Will payments be index linked?

There is a presumption in CPR 41.8 that awards will increase annually in line with the RPI but this may be disapplied under section 2(9) of the Damages Act.

There is debate as to whether future care is properly provided by the multiplier/ multiplicand system using the 2.5% return rate. Courts may take the opportunity to get around the decision in ***Cooke v. United Bristol Healthcare*** *[2004] PIQR Q2*.

It is argued that an index of RPI plus 2% would reflect the changes of RPI as against actual care costs in recent years but the effect in Cooke would have be to turn the £2.3m award into £4.6m.

Is tax exemption relevant?

A very real advantage of periodical payments exists for the Claimant in their exemption from inclusion in income assessment for the purposes of tax, benefits and housing assistance. (Section 329AA of the *Income and Corporation Taxes Act 1998* (as amended), the *Social Security Amendment (Personal Injury Payments) Regulations 2002* and the *National Assistance (Assessment of Resources)(Amendment) (no.2) Regulations 2002.*) This is an important consideration.

A Claimant may be unemployable and have care needs. If his pre injury earnings level was £15,000 a year and he needs domestic assistance valued at £10,000 a year he has a need for £25,000 a year. His general damages and past losses may do little more than pay off his debts leaving a small sum under £3,500. He has been on benefits of £150 a week for some time and his rent is paid. He is exempt from Council Tax. If he gets a lump sum then it all goes in the bank and he must pay his own way again. If he receives it by way of an appropriate periodical payments order he will get both his income and his benefits – a very real windfall. The only problem is that he would have to spend his money and not accumulate it otherwise the savings would take him out of benefits!

Of greater advantage still would be the same illustration but there is a 50% deduction for contributory negligence. The annual payments would reduce to £12,500 a year but the balance would be made up by benefits.

Is Part 36 affected?

The following has now been inserted to Part 36:

36.2A – This rule applies to a claim for damages for personal injury which is or includes a claim for future pecuniary loss.

36.2A includes the following provisions:

Where an offer includes an offer to pay the whole or part of the damages as a lump sum the amount of the lump sum must be paid into court.

Where the defendant makes an offer in respect of periodical payments as well as a payment into court of a lump sum the offer must include details of the payment and Rules 36.11 and 36.13 (Time for Acceptance and Costs Consequences) apply as if there were only a Part 36 offer: the payment is ignored for the purpose of determining times (PD 7.2A).

An offer to pay or accept may be made in respect of damages for future pecuniary loss in the following forms:

(i) Either a lump sum or periodical payments, or
(ii) Both a lump sum and periodical payments.

An offer to pay or accept may be made in respect of any other damages in the form of a lump sum.

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An offer MUST state the amount of any lump sum offered.
An offer MAY state:
(i) What part of the offer relates to damages for future pecuniary loss in the form of a lump sum.
(ii) What part of the offer relates to non-future pecuniary-loss-damages in the form of a lump sum.
An offer MUST state what part of the offer relates to damages for future pecuniary loss to be paid in the form of periodical payments and MUST specify:
(i) The amount and duration of the periodical payments.
(ii) The amount of any payments for substantial capital purchases and when these are to be made.
(iii) That each amount is to vary by reference to RPI (or other named index) or that it is not to vary by reference to any index (Ss2(8)(9) Damages Act 1996 deals with index-linking of periodical payments).
(iv) That any damages which take the form of periodical payments will be funded in a way which ensures that the continuity of payment is reasonably secure (S2(4) Damages Act 1996).
Where the defendant makes a Part 36 offer which includes a lump sum and periodical payments the claimant may only give notice of acceptance of the offer as a whole (PD 7.11)

How should a case be pleaded?

Consider part 41.5 of CPR -
(1) In a claim for damages for personal injury, each party in its statement of case **may** state whether it considers periodical payments or a lump sum is the more appropriate form for all or part of an award of damages and where such statement is given must provide relevant particulars of the circumstances which are relied on.
Where a statement under paragraph (1) is not given, the court may order a party to make such a statement.

The word "may" is crucial in that parties potentially have a choice as to whether or not they plead periodical payments. However under 41.6 of the CPR the court "shall" consider whether they are appropriate. In all cases containing future loss, pleading PPs will be an issue.

Steve Weddle, Henry Slack & Camilla Church

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